judicial rulings upon evidence, we are concerned merely with the propriety of admitting the fact at all—with its quality as a possible inference, not as absolute proof."

In considering what permissive inferences may be drawn from established facts, Professor Wigmore in section 32 of the aforesaid treatise states the rule as follows:

"The failure to include a single other rational hypothesis would be from the standpoint of proof, a fatal defect; and yet, if only that single other hypothesis were open, there still might be an extremely high degree of probability for the conclusion first claimed. When Robinson Crusoe saw the human footprint on the sand, he could not argue inductively that the presence of another human being was absolutely proved. There was at least, for example, the hypothesis of his somnambulism. Nevertheless the fact of the footprint was for his conclusion evidence of an extraordinary degree of probability, i. e., it passed beyond the line of mere admissibility. The requirement or test then for this lower standard—admissibility—would be something like this: Does the evidentiary fact point to the desired conclusion not as the only rational hypothesis, but, as the hypothesis or explanation more plausible or more natural out of the various ones conceivable? Or to state the requirement more weakly, is the desired conclusion not the most natural but a natural or plausible one among the various conceivable ones?"

The ruling of the Supreme Court of Pennsylvania, in *Johnson v. Philadelphia and Reading Rway Co.*, 283 Pa. 480 (1925) is clearly distinguishable from the instant case. In that case, it was held that the presence of plaintiff's automobile on the sidewalk could not be inferred from the testimony of a witness who reached the scene of the accident an hour after its occurrence that he observed tire marks on the sidewalk where there was nothing to show "that the marks were not there before the accident or that they were not made by some other car after the accident." The court pointed out "As this was a public street, and there was

nothing to connect the marks with the car in question, the conclusion sought to be drawn was a mere guess and the offer was properly excluded."

In the instant case, the surrounding circumstances do connect the defendant's truck with the decedent. The very basis of the plaintiff's claim is that it was this particular truck which struck this particular decedent. Certainly, in the light of all the surrounding circumstances, it cannot be said that an inference that the finger prints and brush marks on the defendant's truck were traces of this accident, was a mere guess and not a matter of logical deduction from the evidence. In this connection, it should be noted that the Supreme Court of Pennsylvania in Johnson v. Philadelphia and Reading Rway Co., supra, made another ruling on evidence involved in that case, which indicates that that tribunal was not of the opinion that evidences of traces of an accident of the type with which we are here concerned, required further direct proof to render it relevant. The court in that case, at page 484, said: "Marks were found on the tender back of the engine from which it is urged for defendant that the car ran into the train at that point, but as the collision turned the car around and as one of the defendant's trainmen testified he heard a scraping noise alongside the train, it is quite possible the marks on the tender did not result from the first contact."

We submit that it is noteworthy that the Supreme Court did not hold that the testimony as to the traces of the collision which existed on the defendant's engine were irrelevant in the absence of direct affirmative proof that they were actually caused by the litigated collision. The admissibility and relevancy of such evidence was conceded and all that the court held was, that such evidence was not *conclusive* of the fact that that was the actual point of contact, in view of the testimony of the scraping noise alongside the train.

Gibson, J., in speaking for the United States Circuit Court of Appeals, for the Third Circuit, in an opinion filed on

February 14, 1945, reported in 147 Fed. (2d), clearly met the issue as follows:

> "The attention of the court has been called to several cases in which tire or skid marks have been ruled out in cases of automobile accidents when not the subject of testimony until a considerable time after the accident. The courts so excluding such testimony have considered the number of motor vehicles on the road and the great probability that another car than that to which the mark was attributed had caused it. Those cases are not parallel with the instant case. Whatsoever may be the claim of the defendant, the complainants cannot assert that the defendant's truck and trailer were not in the accident. If it bore no evidence of collision on its truck part and did have such evidence on the trailer, the effect of it would be a material contradiction of the testimony of Joseph Plizak, who had the Shenko boy struck by the front of the truck while he was standing in plain sight on the street, and would confirm the testimony of the witnesses for defendant who saw no boy in the street and asserted that the front of the truck had collided with no person.
>
> "In admitting the testimony of the police officer, particularly in view of the testimony which preceded the testimony as to brush marks and finger marks, we feel that the court was not in error. It will be recalled that a photograph had been offered in evidence without any objection."

Wherefore, respondent respectfully submits that the petition for writ of certiorari should be dismissed.

Respectfully submitted,

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End